

EPA-PNL-4876

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To Phil North

cc

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Subject 404c summary

1 attachment



Projects Vetoed updated.pdf

Phil - this is still in draft form but I thought you might find it informative. I'll make sure and send the final when its complete.

PROJECTS VETOED UNDER CLEAN WATER ACT § 404(C)

Project	State	Region	Wetland Impacts (acres)	"Veto" Type	Project Type	Effective Date of Veto	Administration	Key Details of determination (primary reason for "veto").	Notes	Case Law ¹
North Miami Landfill	FL	IV	303	Restricted; Prohibited	Landfill	January 19, 1981	Carter	Restriction and Prohibition based on existing and anticipated water quality impacts. Restriction of existing permit (75B-0869) and rejection of proposal to expand activity under supplemental permit (77B-0376). Rejection based primarily on bad record / impacts arising out of original permit (EPA used the term "gross contamination" in reference to past operations). Groundwater contamination impacting firewater fish and mangrove swamps/preserves. Direct hydrological connection to critical estuary for shellfish, fisheries, wildlife, recreation.	Significant "high profile" opponents to the project noted in rationale.	
M.A. Norden, Mobile	AL	IV	25	Prohibition	Business Park / Warehouse complex / Fiber recycling facility	June 15, 1984; Modified August 29, 1994 ² .	Reagan; Clinton	<ul style="list-style-type: none"> Unacceptable adverse effects on wildlife at the site and on shellfish beds and to the commercially valuable fishery resources in the adjacent River and Bay (via decrease in production and export of plant biomass, which is critical to the estuarine food webs). Alternative, less damaging upland sites available Tract provides many benefits including fish and wildlife habitat, hydrological buffering, water purification, pollution and erosion traps and food chain production. Failure to comply with 404(b)(1) guidelines. 	Significant issue related to jobs and unemployment in the area. Controversy about suitability of site for fill was documented prior to purchase by applicant.	
Maybank, Jehossee Island	SC	IV	900	Prohibition	Pond creation for duck-hunting	April 15, 1985	Reagan	<ul style="list-style-type: none"> Risk of impact to water exchange and filtration benefit;³ impact to feeding and spawning for fisheries (via loss of tidal exchange of nutrients, a "fundamental element in the food chain") Proposal to increase ponds for waterfowl would result in concentration of waterfowl, leading to increased quantities of nutrient laden feces, which in turn would induce algae blooms, depleting oxygen and leading to reduction of food supply for indigenous marsh/estuarine biota, fish and wildlife.⁴ Public would be excluded (currently provides opportunity for recreation on apx 21 water courses connected to the project during high tide). 	Vital and Finite Resource at risk. Great focus on importance of cumulative impacts.	
Bayou aux Carpes	LA	VI	3,000	Restriction	Flood control and land reclamation	October 16, 1985	Reagan	<ul style="list-style-type: none"> Tract provides many benefits including fish and wildlife habitat, hydrological buffering, water purification, pollution and erosion traps and food chain production. Risk of impact to water exchange and filtration benefit;⁵ impact to feeding and spawning for fisheries (via loss of tidal exchange of nutrients, a "fundamental element in the food chain") Concern noted about anticipated future activity that would be encouraged if this permit granted. History of opposition from EPA and other agencies. 	Court ordered issuance of permit, but stayed order to allow EPA opportunity to exercise 404(c) authority. The restriction was significantly modified in 2009 in light of "compelling circumstances" following Katrina and flooding in the region. ⁶	Y ⁷
Attleboro Mall/Sweeden's Swamp	MA	I	32-45	Prohibition	Shopping Mall	May 13, 1986	Reagan	<ul style="list-style-type: none"> Offer of mitigation inconsistent with 404(b)(1) guidelines bc impact avoidable - Alternative less-damaging, sites available. Veto issued, "based on the excellent wildlife value of the wetland in question, its size and setting, the avoid ability of the loss, the significance of such areas in Massachusetts, and the scientific uncertainty of mitigation attempts."⁸ Risks involved are unacceptably high for non water-dependent project which would unnecessarily destroy natural wetlands of proven environmental value. 	Concern about success of proposed mitigation compared to certainty of loss in project development.	Y ⁹
Russo Development Corp.	NJ	II	58	Withdrawal; Prohibition; (prohibition later	Warehouse complex.	March 21, 1988; September 13, 1995.	Reagan; Clinton	Denies legal authorization for existing, un-permitted fill on 52.5 acres; denies approval of permit for new fill on additional 5 acres.		Y ¹¹

¹ Challenge to 404(c) decision directly – some of these projects have additional legal issues that were litigated and are not included on this list unless directly related to the 404(c) action..

² Modification following multiple petitions for consideration of the total site prohibition resulted in approval of permit to discharge 9,300 cubic yards of dredged or fill material into approximately 1.5 acres of wetlands for purposes of constructing a road to access the alternative upland site.

³ EPA did a dye-test, finding that the marsh served a pollutant filtering mechanism, improving water quality to the estuarine environment.

⁴ Many species present and supported including birds, fish, reptiles and plants.

⁵ EPA did a dye-test, finding that the marsh served a pollutant filtering mechanism, improving water quality to the estuarine environment.

⁶ EPA noted the unique nature of the modification: "This situation is without precedent. Because it reflects a series of extraordinary circumstances, we do not expect this decision to have any bearing upon other current or future CWA Section 404(c) designations or modification requests."

⁷ Creppel v. US, 41 F.3d 627 (

⁸ 51 FR 22977 (June 24, 1986).

⁹ Bersani v. U.S. E.P.A. 850 F.2d 36, 40 (C.A.2 (N.Y.),1988); cert denied.

				modified to a restriction) ¹⁰						
Henry Rem Estate, East Everglades	FL	IV	432	Withdrawal; prohibition	Conversion to farmland.	June 15, 1988	Reagan	<ul style="list-style-type: none">• 33 species on various protected lists occur in area (among other non-listed species).• Threat to groundwater based on loss of filtration values and potential for transport of nutrients, herbicides, pesticides, oils etc that may be associated with the development.• significant concerns with cumulative impacts facing everglades generally• Concerned about species needs globally: “many of these species for which the [subject properties] provide essential habitat needs have suffered population declines due in whole or in part to the loss and / or alteration of habitat, which in a number of instances resulted in their listing as endangered, threatened or of special concern by the [feds or state]...” EPA noted that “there have been significant cumulative losses” of the type of habitat found in this area and that “these losses have been linked to the decline of some species in this region.” EPA also noted that the proposed activity would “aggravate the effect of these losses.”	Concern that approval would encourage future damaging activities by others. (this approval may be viewed as precedent to stimulate future wetland conversion projects in this area)	
Lake Alma Impoundment	GA	IV	1,155	Withdrawal, prohibition	Impoundment for Recreational Lake	December 16, 1988	Reagan	<ul style="list-style-type: none">• 228 square mile watershed. Impacts include inundation of 7.2 mile segment of Hurricane Creek, several unnamed tributaries, and the wetlands lying adjacent to both the creek and the tributaries and the destruction of 1,350 acres of relatively undisturbed bottomland hardwoods.• “Habitat provides high quality, diverse habitat for fish and wildlife, travel corridor for upland and wetland animals, food web production for on-site and downstream biological communities, nutrient and pollutant uptake and assimilation, floodwater storage, and flow moderation.”¹²	“The impacts of the Lake Alma Project cannot be viewed in isolation.” ¹³ EPA looked beyond the proposed project itself to put the impacts and benefits in the context of the Region as a whole. Pointing to scale loss of wetland loss throughout the entire Southeast and Georgia specifically, EPA noted that this type of habitat is among the most productive wildlife habitats in the coastal plain and it is being damaged and lost throughout the Region.	Y ¹⁴
Ware Creek Water Supply	VA	III	425	Prohibition (1989) ¹⁵ and Withdrawal (1992).	Municipal Water Supply.	July 10, 1989; reaffirmed March 1992. ¹⁶	G.H.W. Bush	<ul style="list-style-type: none">• Project would result in loss of a diverse wetland and open water aquatic habitat providing critical ecological support to wildlife, associated ecosystems and downstream aquatic systems.• Applicant County had practicable, less environmentally damaging alternatives for meeting water supply needs.• area supports “an uncommon and significant natural aquatic resource...provides exceptional natural habitat upon which a variety of wildlife species depend for all or part of their life cycle”	EPA objected long before 404 application submitted: 1981 letter read, “destructive impacts to such a large area of the local wetland resource would be unacceptable. EPA would therefore strongly object to any water supply structure placed in this waterway.” ¹⁷	Y ¹⁸
Big River Water Supply	RI	I	1,150	Prohibition ¹⁹	Municipal Water Supply	March 1, 1990	G.H.W. Bush	<ul style="list-style-type: none">• Unacceptable adverse effect on wildlife and recreational areas.• Avoidable because practicable alternative are available to meet water supply needs.• adverse effects cannot be adequately mitigated: evaluation considered “poor track record of wetland creation and enhancement projects to compensate for projects involving much less severe impacts,”• Unique resource - State has very few remaining cold water fisheries; warm water are common – project would convert.• Proposal would alter both ground and surface water flow.	Concerns of violation of state WQS.	
Two Forks Water Supply	CO	VII	300	Prohibition	Municipal Water Supply	November 23, 1990	G.H.W. Bush	<ul style="list-style-type: none">• Fishery is “extremely valuable and unique resource”• Irretrievable loss of Gold Medal trout fishery plus habitat for multitude of other species.• Resource is of great value, the resource is difficult if not impossible to replace in-kind, and impacts are avoidable via less damaging, practicable alternatives• Even if no less damaging alternative existed – significance of damage to fishery and recreation area – even after consideration of proposed mitigation- would be so great that they would constitute an unacceptable adverse effect.	Noteworthy comments on defining project purpose to aid in evaluation of reasonable alternatives; ²⁰ and on role and value of mitigation ²¹ EPA weighed in with significant comment and concern during NEPA process; including sig. objections to Corps FEIS. USACE issued notice of intent despite comments; EPA published notice of	Y ²²

¹⁰ Restriction allows that prohibition is lifted, allowing Russo to apply to Corps for 404 permit *provided that* “the terms of the authorization require Russo to (1) deed over for preservation and any appropriate enhancements, an approximately 16.3 acre parcel of wetlands located in Ridgefield, New Jersey; and (2) provide funding in the amount of \$700,000 for the purpose of enhancing wetlands in the Hackensack Meadowlands.” 60 FR 47568, 47570 (September 13, 1995).

¹¹ Russo v. Thomas 735, F.Supp.631 (D.N.J.1989).

¹² 53 FR 26859, 26861 (July 15, 1988).

¹³ 53 FR 26859, 26862 (July 15, 1988). (“Forested wetlands and the valuable fish and wildlife habitat they provide have been rapidly declining in the Southeast during the last four decades. On the other hand, flat-water habitat, such as lake, reservoir, ponds, and mining pits, has increase. The anticipated wetlands loss represents a substantial portion of the wetlands in the Hurricane Creek watershed and is regionally significant.”)

¹⁴ City of Alma v. U.S., 744 F.Supp.1546 (S.D.Ga1990).

¹⁵ Total prohibition against placement of fill for purposes of constructing water supply; other uses not precluded.

¹⁶ Reevaluation following court ordered remand. Re-evaluation resulted in determination withdrawing specification of the subject waters as described in USACE permit no 84-0614-06 dated March 1, 1991 and restricts disposal for purpose of constructing the reservoir as proposed. No construction activity had taken place.

¹⁷ County applied for permit anyway in 1984. USACE issued notice of intent to issue a permit in July of 1988. EPA published proposed determination in November 1988. Such a project had been under consideration for years.

¹⁸ James City County, VA v. E.P.A., 12 F.3d. 1330 CA 4th 1993 (cert denied 513 U.S. 823, 115 S.Ct. 87).

¹⁹ Total prohibition against placement of fill for purposes of constructing water supply; other uses not precluded.

²⁰ 54 FR 36862, 36866.

²¹ Id at 36870.

²² Alameda Water and Sanitation District v. Reilly, 930 F.Supp.486 (D.Colo.1996).

									proposed determination that same month.	
Yazoo Backwater Area Pumps Project	MS	IV	67,000 ²³	Prohibition.	Civil works flood control program (levee and pumps)	September 19, 2008	G.W. Bush (<i>Bush II</i>)	<ul style="list-style-type: none">proposed discharge of fill material into 43.6 acres of wetlands would result in unacceptable adverse effects on at least 67,000 acres of wetlands and other waters and their associated wildlife and fisheries resources.EPA does not believe that these adverse impacts can be adequately compensated for by the proposed mitigation, and are inconsistent with the requirements of the CWA. Further, these impacts should be viewed in the context of the significant cumulative losses across the Lower Mississippi River Alluvial Valley (LMRAV), which has already lost over 80 percent of its bottomland forested wetlands, and specifically in the Mississippi Delta where the proposed project would significantly degrade important bottomland forested wetlands.	EPA was actively and significantly engaged with this project for decades. Numerous interagency and stakeholder meetings from early 1980s forward. Concerns raised starting in response to initial DEIS in 1982. Project put on hold owing to funding issues following FEIS in 1983. EPA initiated action (2/2008) after concerns with Supplemental Draft (9/2000) and Final EIS (11/2007) were inadequately addressed.	Public feedback / concern was a significant factor.
Big Branch Surface Mine	KY	IV	22,000	Proposed withdrawal.	Surface Mine	Underway		<ul style="list-style-type: none">Failure to comply w/ 404(b)(1) guidelinesUncertainties w/ proposed mitigation plans		
Spruce No. 1 Surface Mine (Mingo Logan)	WV	III		Proposed withdrawal.	Surface Mine; Mountain Top Removal	Underway		<ul style="list-style-type: none">Impacts to 50 or so endangered, threatened or rare species that rely on health of the river system.River sub-basin host to 283 miles of designated high quality streamsPermit fails to address cumulative impacts; fails to contain sufficient conditions to ensure effective compensation / mitigation for loss of stream function.	Largest Mountaintop Coal Mine First(?) use of 404(c) to withdraw lands from previously permitted project EPA criticizes reliance on minimally acceptable methods when “every effort should be employed to maximize avoidance of impacts to aquatic resources.”	Y ²⁴

²³ 150-230,000 acres of wetlands estimated in the area generally, but 67,000 estimated for areas that would be degraded.

²⁴ Long history of legal challenge surrounding the Mine. Earthjustice involved.